


Legal Information and Legal Advice Managers and Supervisors



**NATIONAL ASSOCIATION FOR COURT
MANAGEMENT
MIDYEAR MEETING
PORTLAND, OREGOAN
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CLERKS
CANNOT
GIVE
LEGAL
ADVICE

Examples of State and Federal Guidelines

- Arizona
- California
- Colorado
- Delaware
- Florida
- Idaho
- Illinois
- Iowa
- Michigan
- Missouri
- New Mexico
- New Jersey
- New York
- North Dakota
- North Carolina
- South Carolina
- Utah
- Washington
- Wisconsin
- Federal Judicial Center training materials
- Canadian provinces

Objectives for this Session



- Explain the difference between legal information and legal advice in a way that makes it clear for most situations that frontline staff encounter
- Show that the legal information that staff can provide is vastly greater than the legal advice that they cannot provide
- Show how staff can provide legal information in response to a question asking for legal advice
- Address the special problems that managers and supervisors confront in dealing with this issue

Problems with a vague standard



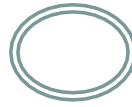
- Clerks tend to give less information
- Practice varies from court to court and clerk to clerk and day to day
- Clerks don't treat everyone the same
 - Against laypersons and in favor of lawyers
 - Against difficult people and in favor of nice ones
 - Depending on the workload
 - Against minorities

Principles For a Sound Policy



- The courts must provide information to court users about how the process works
- The limitations on what court staff can provide derive from ethical principles governing the courts
- Court staff need clear guidelines

Traditional UPL View

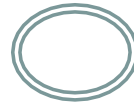


**Persons
Admitted to
the Practice of
Law Currently
in Active
Status**

**All Other
Persons**

Scope of Practice
Limited Only by
Areas of
Competence and
Conflicts of Interest

Washington State Bar Committee Insight



**Persons
Admitted to
the Practice of
Law Currently
in Active
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Scope of Practice
Limited Only by
Areas of
Competence and
Lawyer/Client
Relationship

**Court Staff –
Specialized
Knowledge
and Necessity
of Public
Assistance**

Provision of Legal
Information
Consistent with
Court's Impartiality
Imperative

**All Other
Persons**

Turner v. Rogers

131 S.Ct. 2507 (June 20, 2011)



- Appointment of an attorney is not required in South Carolina civil contempt case resulting in one year confinement for failure to pay child support
- But civil contempt judgment reversed for trial court's failure to provide "substitute procedural safeguards"

Substitute Procedural Safeguards



- “1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding;
- (2) the use of a form (or the equivalent) to elicit relevant financial information;
- (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and
- (4) an express finding by the court that the defendant has the ability to pay.”

Substitute Procedural Safeguards



“assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient”

Ethical Obligations of Court Staff



- To remain impartial
 - with respect to parties in a case
 - with respect to lawyers in the community
- To maintain confidential information
- To avoid ex parte communications
- To perform competently

Applicability of These Principles



- To all employees working in the court – whether or not they are lawyers
- To self help services provided in the court, regardless of the provider of those services
- To legal services staff providing self-help assistance

Maryland – The US Exception



- Lawyers employed by or under contract to a court can provide legal advice pursuant to American Bar Association Model Rule of Professional Conduct 6.5
- “A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter” does not need to conduct a conflict check and is conflicted out only if s/he knows of an actual existing conflict.

Definitions



- **Legal information**

Facts about the law and the legal process

- **Legal advice**

Advice about the course of action a client should take to further his or her own best interests

General Guidelines



- **Legal information**

Staff should answer questions that call for factual information – questions that start with “who,” “what,” “when,” “where,” or “how.”

- **Legal advice**

Staff should not answer questions that call for an opinion about what a litigant should do – questions that contain the words “should” or “whether.”

General Guidelines



- **Legal information**

Staff should tell a litigant how to bring an issue to the attention of the court.

- **Legal advice**

Staff should not suggest whether it is wise to bring that issue before the court, how best to present the issue, or how the judge is likely to decide the case.

General Guidelines



- **Legal information**

Staff should inform a litigant of his or her options and the steps needed to carry out an option.

- **Legal advice**

Staff should not suggest which option the litigant should pursue.

General Guidelines



- **Legal advice is counselling**

A lawyer is always asking, “What should this client do?”

- **Legal information is educating**

Court staff are always asking, “What information does this litigant need to know in order to decide what to do?”

General Guidelines



- **The Website Rule**

Anything that is on the court's or the province's or the judicial branch's website, or on any website to which those sites link, is legal information.

You can always refer people to websites, or print out website content for them. But if you are interacting with them, you should provide the information and provide a copy or a URL. A referral without some explanation is a brush off.

General Guidelines



How a communication is framed determines whether it is appropriate or inappropriate

Examples of state guidelines



- **Staff can explain court rules and procedures**
- **Staff cannot suggest which of several available procedures a litigant should follow**

Examples of state guidelines



- **Staff can provide information about past rulings in a case**
- **Staff cannot predict what the court will do in the future**

Examples of state guidelines



- **Staff can provide cites to (or copies of) statutes, court rules, and ordinances**
- **Staff cannot provide an analysis or interpretation of statutes or ordinances based on the specific facts of a litigant's case**

Examples of state guidelines



- **Staff can explain what records are kept by the court and can be made available to the public**
- **Staff can provide public case information**
- **Staff cannot provide confidential case information**

Examples of state guidelines



- **Staff can explain how and where to file a complaint concerning a judge, court employee or private attorney**
- **Staff cannot provide opinions about the conduct of a judge, court employee or private attorney**

Examples of state guidelines



- **Staff can provide general referrals to other offices or persons**
- **Staff cannot provide referrals to other offices or persons based upon personal preferences**

Examples of state guidelines



- **Staff can provide forms and instructions, and record on the forms information provided by the litigants**
- **Staff can check a court user's papers for completeness and inform the person of specific problems identified and how to fix them**
- **Staff cannot provide or suggest the information that should be entered on the forms**

Extract from MN Rule 110 on Self-Help Programs

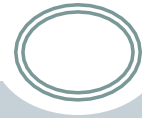
- (b) Permitted, but Not Required, Acts.** Self-Help Personnel may, but are not required to:
- (1) provide forms and instructions;
 - (2) assist in the completion of forms;
 - (3) provide information about court process, practice and procedure;
 - (4) offer educational sessions and materials on all case types, such as sessions and materials on marriage dissolution;
 - (5) answer general questions about family law and other issues and how to proceed with such matters;
 - (6) explain options within and outside of the court system;
 - (7) assist in calculating guidelines child support based on information provided by the Self-Represented Litigant;
 - (8) assist with preparation of court orders under the direction of the court; and
 - (9) provide other services consistent with the intent of this rule and the direction of the court, including programs in partnership with other agencies and organizations.

Specific California guidelines



- **Staff can prepare standardized, boilerplate, fillable form points and authorities that can be used by self-represented litigants**
- **Staff can develop forms for use by self-represented litigants**
- **Staff cannot prepare individualized points and authorities for a specific litigant**

Specific California guidelines



- **Staff are specifically authorized to explain and clarify court orders.**
- **Staff are specifically authorized to assess the status of a litigant's case and provide directions concerning court requirements and procedural next steps**

Specific California guidelines



- **Self help staff must provide the same assistance, at the same level of service, to both sides of all types of cases served.**

Extracts from Delaware Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants



- **2.5 Materials and Services for Self-Represented Litigants:** Judges should encourage the provision of information and services to better enable self-represented litigants to use the courts. Judges also should encourage self-represented litigants to use these resources.
- **3.1 Trial Process:** Judges should make a reasonable effort to ensure that self-represented litigants understand the trial process. Judges should inform litigants that the trial will be conducted in accordance with applicable evidentiary and court rules.

California ethical guidelines



- **Self-help center staff may not accept anything of value in the form of gifts, favors, bequests, or loans from persons they assist.**
- **Self-help staff must avoid all ex parte communications with bench officers unless working as a research attorney or in a capacity permitted under Family Code 10005**
- **Self-help staff may not offer an opinion to a bench officer on how the bench officer should rule on a pending case.**

California ethical guidelines



- **Communications about purely procedural matters or the functioning of the court are allowed and encouraged.**
- **Self-help staff must not provide assistance on any issue on which an attorney actively represents a litigant. This does not prohibit assistance on how to file a substitution of attorney, or respond to a request to be relieved as counsel**

California ethical guidelines



- **Court staff must see that volunteer attorneys comply with the ethical guidelines, do not solicit or accept clients from their volunteer work, or make referrals to a specific attorney**

Guidelines are not enough



- Clerks need procedures manuals to which they can refer for correct answers to procedural questions
- Clerks need permission to say they don't know the answer to a particular question
- Clerks need standard handouts on FAQs, such as service of process
- Clerks need training to apply these principles
- Clerks need customer service skills

Answering Litigant Questions – The RIGHT Steps

- Is s/he in the **Right** place?
 - Is this the right court?
 - Am I the right person to answer the question?
- What **Information** can I give?
 - Do I know the answer to the question?
 - How can I address the question using legal information?
- Does s/he **Get** what I have said?
- Do I have relevant written **Hand outs**?
- What other place(s), if any, should I send her or him **To**?

Issues for Managers and Supervisors



- Supervision of staff interactions with the public
- Resistance of staff with long tenure
- Training
 - Detail-oriented
 - Repetitive
- Opposition from the bar
- Maintaining common understandings with your own judges
- Dealing with staff errors

Additional Resources



Application of the General Principles to Your Situation

